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In the Supreme Court of the United States

OCTOBER TERM, 1984

THOMAS EDGAR MORRIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant may be convicted for conspiracy to violate 18 U.S.C. 1962(c) without agreeing to commit personally at least two predicate offenses.

2. Whether conviction of conspiracy to violate 18 U.S.C. 1962(c), based on the infiltration of a legitimate business, requires proof of a nexus between the business's intended function and the pattern of racketeering activity.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 721 F.2d 1514.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1984. A petition for rehearing was denied on February 29, 1984. The petition for a writ of certiorari was filed on April 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Georgia, petitioners were convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute, in violation of 18 U.S.C. 1962(d) (count 1). In addition, all of the petitioners except Thomas Morris were convicted of one or more

counts of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (counts 2-4). Petitioners Larry and Suzette Jackson were convicted of federal tax offenses, in violation of 26 U.S.C. 7201 and 7206(1) (counts 6-7).[1] The court of appeals affirmed the RICO conspiracy and marijuana possession convictions, as well as Larry Jackson's conviction on count 7, which charged that he had filed a false income tax return. The court reversed the convictions of Larry and Suzette Jackson on count 6, which charged them with tax evasion. Pet. App. 1a-4a.

The pertinent evidence, which is not in dispute, is set forth in the opinion of the court of appeals. It shows that at least as early as 1979 Larry Jackson and his associates were bringing planeloads of marijuana into Appling County, Georgia. Thomas and Lemuel Morris owned a dairy farm 20 miles south of Baxley, Georgia. Thomas, who was the active manager, was present at the dairy farm on a daily basis and resided next to the farm. At some time prior to March 1980, an airstrip was constructed on an open field on the farm. Larry Jackson and Lemuel Morris used the airstrip to land planeloads of marijuana and hashish. Access to the airstrip was gained by the use of a road adjacent to Thomas Morris's house. A house used for storing the drugs was located nearby.

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[1]Lemuel and Thomas Morris and Larry Jackson were sentenced to imprisonment for 20 years and fined $25,000 on count 1. Lemuel Morris and Larry Jackson received consecutive prison terms of 15 years and $125,000 fines on each of counts 2-4. Larry Jackson received concurrent five and three-year terms on the tax counts. Suzette Jackson was sentenced to imprisonment for 20 years and fined $25,000 on count 1. On counts 2 and 3, she was sentenced to concurrent 15-year terms and cumulative fines of $125,000. On the tax count on which she was convicted, Suzette Jackson received a five-year concurrent sentence and a $10,000 fine. Sapp was sentenced to consecutive terms of imprisonment of ten years on counts 1 and 2, as well as fines of $25,000 and $75,000 on those counts.

On the evening of August 29, 1980, an airplane with a cargo of 7,000 pounds of marijuana arrived at the farm. Among those present for the landing were petitioners Sapp, Lemuel Morris, Larry Jackson, and Suzette Jackson (Larry's wife and the bookkeeper for his drug business). Sapp assisted several other men in transferring the cargo from the airplane to waiting trucks. The airplane then flew off, the trucks containing the marijuana drove away, and the Jacksons left the scene. Lemuel Morris announced that he expected another airplane to arrive that evening, and Sapp and several others agreed to remain behind and unload the second craft. Shortly thereafter an airplane with a cargo of 1,200 pounds of hashish landed on the airstrip. After the hashish was transferred to a pickup truck, the airplane left. The participants then departed for the storage area.

Another shipment of marijuana belonging to the Morrisses and Larry Jackson arrived at the airstrip in mid-September 1980. Larry Jackson and Lemuel Morris were present at the airstrip and observed the unloading. Because the airplane's landing gear had been damaged when it landed, it could not take off, and Larry Jackson assumed responsibility for concealing the aircraft in woods near the airstrip. Three days later, Larry and Suzette Jackson and others went to a house where the marijuana was being stored. While there, Larry Jackson assisted several of his employees in loading bales of marijuana into a Winnebago motor home.

In late October, a shipment of marijuana unexpectedly arrived at the airstrip during a rain storm. The unloading was successfully completed, and the marijuana was removed to a "stash" house. At the stash house, in the presence of Suzette Jackson, Larry Jackson and some of his employees transferred the wet bales of marijuana into a horse trailer.

In early 1981, Larry Carter and Rayford Phillips, two corrupt law enforcement officers who had been working for Larry Jackson, agreed to cooperate with the FBI in its investigation of drug smuggling in Appling County. Both were equipped with body recorders when meeting with Larry Jackson or other members of the drug smuggling organization. Consequently, the FBI compiled numerous recordings of conversations containing incriminating comments made by several conspirators to Carter or Phillips. In one such taped conversation, Jackson expressed concern that one or more of his employees might be cooperating with a grand jury that was investigating drug smuggling activities in the area. At that time, Jackson also offered Carter $10,000 to participate in unloading another airplane. A few days later, Carter and Phillips met with Larry and Suzette Jackson. In a taped conversation, they discussed the grand jury investigation. In addition, Suzette Jackson mentioned the amounts paid to Carter and another local law enforcement officer (co-defendant Joe Lightsey), and Larry Jackson commented that Suzette had learned the business well in just one year.

In March and April 1981, Carter and Phillips taped additional conversations with the Jacksons and Lemuel Morris. In one of these conversations, the Jacksons surmised that an associate of Lemuel Morris was the person who was cooperating with the grand jury. In another conversation, Lemuel Morris expressed fear that either Suzette Jackson or co-defendant James Ricky Williams was the cooperating individual.

ARGUMENT

1. In order to convict a defendant of violating 18 U.S.C. 1962(c), the government must prove that he conducted or participated in the affairs of an enterprise through a "pattern of racketeering activity." A "pattern of racketeering activity" is defined by 18 U.S.C. 1961(5) as two or more acts

of racketeering activity. Petitioners, who were convicted of conspiring to violate 18 U.S.C. 1962(c), contend (Pet. 6-11) that the trial court erred when it declined to instruct the jury that conviction for that offense requires proof that each conspirator agreed, not only to join the conspiracy, but also to commit two or more predicate offenses personally. Petitioners claim that the judge should not have limited his instructions to a description of the elements of 18 U.S.C. 1962(c) and the traditional elements of the crime of conspiracy. The court of appeals disagreed with petitioners and held (Pet. App. 29a-30a):

> [W]hen * * *, as in the present case, a defendant agreed to participate in the conduct of an enterprise's affairs with the objective of violating a substantive RICO provision, it is not necessary that the defendant agreed to personally commit two predicate acts * * *. It is enough that the defendant agreed to the commission of two predicate acts.

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals.[2] It is well established that the crime of conspiracy generally has two elements: (1) an agreement the objective of which is the commission of one or more unlawful acts and (2) the performance by a conspirator of at least one overt act in furtherance of the conspiracy. *Braverman* v. *United States,* 317 U.S. 49, 53 (1942). There is no requirement that each conspirator must agree to personally perform the illegal act or acts that constitute the conspiracy's object. On the contrary, a conspirator may be convicted

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[2]Since the decision below, one other circuit has dealt with this issue. In *United States* v. *Tille,* 729 F.2d 615, 619 (9th Cir. 1984), the court endorsed the ruling in this case.

"upon showing sufficiently the essential nature of the plan and [his] connections with it." *Blumenthal* v. *United States,* 332 U.S. 539, 557 (1947).

In enacting the conspiracy provision of the RICO statute, Congress manifested no intent to alter this established principle. Far from imposing such an additional restriction on the prosecution, Congress mandated that the RICO statute be liberally construed to achieve its objective of combatting organized crime. *Russello* v. *United States,* No. 82-472 (Nov. 1, 1983), slip op. 10-11; *United States* v. *Turkette,* 452 U.S. 576, 588-589 (1981).

In arguing that RICO conspiracy does contain this additional element, petitioners rely principally (Pet. 5, 7-9) on Fifth Circuit cases. However, none of those cases held that conspiracy to violate 18 U.S.C. 1962(c) requires proof that each conspirator agreed to personally commit two or more acts of racketeering. Moreover, in none of those cases did the court focus on the difference between an agreement by each conspirator that two or more predicate crimes *be committed* (which is clearly required for conviction of conspiracy to violate 18 U.S.C. 1962(c)) and an agreement by each conspirator *to personally commit two or more predicate crimes* (which is not required). Thus, the somewhat imprecise language in those opinions on which petitioners rely carries little weight.

In *United States* v. *Elliott,* 571 F.2d 880, 900-905 (5th Cir. 1978), cert. denied, 439 U.S. 953 (1978) (see Pet. 5, 7), the court held merely that the indictment charged a single conspiracy to violate 18 U.S.C. 1962(c) and not multiple conspiracies, as the defendants claimed. The court stated (571 F.2d at 902 (emphasis added)) that "[t]he gravamen of the conspiracy charge *in this case* * * * is that each [conspirator] agreed to participate * * * in the affairs of the enterprise by committing two or more predicate crimes." In

making this statement, the court was describing the facts alleged in that case, not the requirements of RICO conspiracy. The court added (*id.* at 903 (emphasis in original)) that a conspiracy to violate Section 1962(c) requires proof of "an agreement to participate * * * in the affairs of an enterprise *through the commission of two or more predicate crimes.*" This statement is ambiguous. In our view, it may and should be read to mean only that a conspirator must agree to the commission of two or more predicate crimes, not that he will personally commit them.

In *United States* v. *Diecidue*, 603 F.2d 535, 557 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980) (see Pet. 8), the government conceded that one of the defendants had been improperly convicted of conspiracy to violate Section 1962(c) because the evidence "fail[ed] to show agreement [by him] to participate in the affairs of the enterprise through two or more racketeering activites." As the evidence summarized by the court (603 F.2d at 557-558) makes clear, however, the defect in the government's proof was not simply the lack of evidence that the defendant agreed to personally commit two or more predicate crimes. Rather, the evidence failed to show that the defendant had agreed to participate in a conspiracy involving the commission of two or more acts of racketeering. At most, the evidence showed that the defendant agreed to the commission of (and participated in the commission of) a single predicate crime.

Petitioners rely (Pet. 8) on the jury instruction given in *United States* v. *Bright*, 630 F.2d 804, 822 n.35 (5th Cir. 1980). That instruction is ambiguous on the point at issue here,[3] and in any event the court of appeals did not approve that instruction in all respects. The court merely found that

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[3]The instruction stated (630 F.2d at 822 n.35) that a conspirator must agree "to participate, directly or indirectly, in two or more acts of racketeering activity."

the instruction conveyed the same message as an instruction requested by the defense, *i.e.*, "that the government must prove that each defendant objectively manifested an intent to participate in the criminal enterprise, and that mere association with nefarious characters is not a ground to convict" (*id.* at 822).

In *United States* v. *Martino*, 648 F.2d 367, 394 (5th Cir. 1981)[4] (see Pet. 7), the court stated that conviction for conspiracy to violate 18 U.S.C. 1962(c) requires proof that the defendant agreed "to participate in the conduct of the affairs of the enterprise through the commission of two or more predicate crimes." The court then reversed a conviction for conspiracy to violate Section 1962(c) where the evidence did not show that the defendant had agreed to the commission of more than one predicate crime (648 F.2d at 396). The court did not hold that the government was required to prove that the defendant agreed to personally commit two or more predicate crimes.

Finally, in *United States* v. *Phillips*, 664 F.2d 971, 1038-1039 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982) (see Pet. 8), the court repeated the dictum from *Elliott* and reversed a conviction for RICO conspiracy because the object of the conspiracy involved the commission of only one predicate offense.

Petitioners rely (Pet. 9-10) on decisions of the Fourth and Eighth Circuits, but those cases also do not conflict with the decision here. In *United States* v. *Karas*, 624 F.2d 500, 503 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981), defendants convicted of violating 18 U.S.C. 1962(d) contended that the jury instructions did not indicate that Section 1962(d) "requires two racketeering activities." The court

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[4]This Court denied the petitions for certiorari challenging the criminal convictions in that case (456 U.S. 943 (1982)). The Court affirmed the judgment of forfeiture. *Russello* v. *United States*, *supra*.

rejected this contention (624 F.2d at 503), noting that the trial judge had instructed the jury that the defendants "could not be convicted under § 1962(d) unless the purpose of the conspiracy was to violate the RICO Act and that at least two racketeering acts had occurred." While this instruction appears flawed in another respect,[5] it did not require proof that each defendant charged with RICO conspiracy agreed to personally commit two or more acts of racketeering. In *United States* v. *Lemm*, 680 F.2d 1193 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983), the defendants did not challenge the jury instruction on RICO conspiracy, and the court did not discuss the elements of that offense.[6]

In sum, in none of the cases on which petitioners rely was a conviction reversed on the ground that a defendant who had agreed to participate in the affairs of an enterprise in the conduct of which two or more acts of racketeering would be committed was not going to commit them personally. Since such a plainly unsound view of conspiracy principles

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[5]The instruction erroneously requires proof that two or more acts of racketeering activity actually were committed and not merely that the conspirators agreed that they be committed. In essence, the instruction seems to demand proof of a substantive violation of 18 U.S.C. 1962(c) in order to convict of conspiracy to violate that provision.

[6]Contending that their severance motions were improperly denied, the defendants argued (see 680 F.2d at 1201) that the trial court had expanded traditional conspiracy doctrine. Rejecting this argument, the court of appeals noted (*id.* at 1202) that the court's charge was patterned after traditional conspiracy instructions. The court quoted (*id.* at 1202 n.9) a portion of the instruction stating that, in order to convict of RICO conspiracy, the government must prove a conspiracy to participate in the conduct of the affairs of the enterprise "through a pattern of racketeering activity, consisting of the commission of two or more acts of racketeering activity." This instruction, which the court of appeals obviously did not endorse in all respects, meant only that the defendant must enter into a conspiracy the object of which requires that two or more acts of racketeering be committed; the instruction did not require that the defendant agree to commit those acts personally.

has not been relied upon by other courts, there is no need to review the correct result reached here.

2. Petitioners claim (Pet. 11-15) that they were improperly convicted of conspiracy to violate 18 U.S.C. 1962(c) because they did not conduct or participate in the affairs of the enterprise (a dairy farm owned by Lemuel and Thomas Morris) "through" a pattern of racketeering activity. Petitioners maintain (Pet. 13) that under 18 U.S.C. 1962(c) the acts of racketeering must be related to "the intended function of the enterprise." The court of appeals examined this argument at length and properly rejected it (Pet. App. 17a-22a). The court correctly concluded (*id.* at 18a) that there was a sufficient nexus between the affairs of the enterprise and the pattern of racketeering because

> (1) a pasture located on the dairy farm was the site on which an airstrip was constructed and utilized for bringing in shipments of drugs; (2) the dairy farm office was used for communication between conspirators concerning protection of the drug smuggling activities from law enforcement authorities; (3) workers of the dairy farm participated in the drug smuggling and protection activities; and (4) a house on the dairy farm property was used for storing the drugs prior to distribution. In short, the evidence revealed that the facilities and employees of the dairy farm were utilized in furtherance of the drug smuggling and bribery venture.

When Congress enacted the RICO statute, one of its chief concerns was the extent to which criminals had infiltrated legitimate businesses (*Turkette,* 452 U.S. at 591). Congress's intent was to strike at the source of the problem by enacting a broad statute making it a federal crime to use a legitimate enterprise for criminal activity. *United States* v. *Swiderski,* 593 F.2d 1246, 1248 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979). Petitioners' interpretation of

Section 1962(c) would thwart this fundamental congressional objective. When an ongoing legitimate business is infiltrated and used for criminal purposes, "the intended function of the enterprise" (*i.e.*, its remaining legitimate business activities) will often be quite different from the illegal activities of its infiltrators.

Petitioners erroneously rely (Pet. 13-14) upon *United States* v. *Hartley*, 678 F.2d 961 (11th Cir. 1982), cert. denied, 459 U.S. 1170 and 1183 (1983), and *United States* v. *Nerone*, 563 F.2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978), to support their interpretation. Any inconsistency between the Eleventh Circuit's decision in this case and its prior decision in *Hartley* is of course a matter for the Eleventh Circuit to resolve. Moreover, there is no inconsistency. In *Hartley* the Eleventh Circuit held (678 F.2d at 991) that the word "through" in 18 U.S.C. 1962(c) was intended to require merely a "sufficient nexus" between the racketeering activities and the affairs of the enterprise. The court then stated (*ibid.*) that in that case it had "no difficulty in finding a sufficient nexus" between "the common everyday affairs of the enterprise" (a seafood company) and the acts of racketeering (deceptive activities related to the production of breaded shrimp). See also *United States* v. *Cauble*, 706 F.2d 1322, 1341 (5th Cir. 1983), cert. denied, No. 83-585 (Jan. 23, 1984). Petitioners seize upon the reference in Hartley to "common everyday affairs" (Pet. 14) and urge that in every case involving 18 U.S.C. 1962(c) the government must show that the illegal activity was related to the daily operations of the enterprise. However, the court in *Hartley* gave no indication that it was enunciating a rule of law when it commented upon the extent of the criminal infiltration of the enterprise in that case. Rather, as the court below concluded (Pet. App. 18a-22a), *Hartley* merely indicated that the nexus in that case was sufficient.

The Seventh Circuit's decision in *Nerone* is not entirely free from ambiguity, but we read that opinion to hold merely that "[t]he government's case must fail because of a total want of proof of connection between the racketeering activities and the affairs of [the trailer park that constituted the enterprise.] Geographical juxtaposition of the enterprises is insufficient" (563 F.2d at 852). There was no similar absence of proof in this case,[7] and the nexus between the enterprise and the pattern of racketeering was much more than mere geographical juxtaposition. Here, the importation of drugs constituted a significant part of the enterprise's affairs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]To the extent that *Nerone* may suggest that conviction under 18 U.S.C. 1962(c) requires proof that the racketeering activity benefited the enterprise, it should be noted that both before and after *Nerone* the Seventh Circuit has affirmed convictions in which the interests of the enterprise were not furthered by the pattern of racketeering. See, *e.g.*, *United States* v. *Kovic*, 684 F.2d 512 (7th Cir. 1982), cert. denied, 459 U.S. 972 (1982) (police officer who used position to obtain kickbacks and perpetrate fraud participated in the affairs of the enterprise (the police department) through a pattern of racketeering); *United States* v. *Grzywacz*, 603 F.2d 682 (7th Cir. 1979); *United States* v. *Kaye*, 556 F.2d 855 (7th Cir.), cert. denied, 434 U.S. 921 (1977).